UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7162

D.C. Docket No. CA 89 321 D D

JIM EDMOND,

Plaintiff-Appellant,

versus

NEWMAN WHITNEY, ETC., ET AL.,

Defendant,

NEWMAN WHITNEY, ETC., and
MEMPHIS MACHINERY AND SUPPLY CO., INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

Before:

WIENER, EMILIO M. GARZA and
BENAVIDES, Circuit Judges.

JUDGMENT:

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

August 5, 1994

ISSUED AS MANDATE: SEPT 19, 1994
Clerk, U. S. Court of Appeals
Fifth Court
By: (t.j.t.)
Deputy
S/CHARLES FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7162

JIM EDMOND,

Plaintiff-Appellant,

versus

NEWMAN WHITNEY, ETC., ET AL.

Defendant,

NEWMAN WHITNEY, ETC., ET AL, DEFENDANT
NEWMAN WHITNEY, ETC. AND MEMPHIS
MACHINERY AND SUPPLY CO., INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

CA 89-321-D-D

Before WIENER, EMILIO M. GARZA
and BENAVIDES, Circuit Judges.

PER CURIAM:*

Having considered the briefs submitted by able counsel for the respective parties to this litigation, reviewed the record, and listened to oral argument of counsel, we are convinced that the district court's grants of judgments as a matter of law for

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants-Appellees are free of reversible error. Irrespective of the reasons assigned by the district court, we conclude that Plaintiff-Appellant Edmond's inability to adduce any competent evidence that his injury was proximately caused by a defect in the design or manufacture of the machine in which his injury was sustained doomed his ability to recover. Edmond did not, presumably because he could not, testify as to the proximate cause of his accident; and the evidence he adduced-including, without limitation, his experts' testimony - did nothing to supply the necessary nexus between a defect in the machine and the proximate cause of the injury.

Absent that, Edmond simply failed to meet his burden of proof. We are constrained, therefore, to conclude that the judgments as a matter of law rendered by the district court should be and therefore are.

AFFIRMED
S/CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JIM EDMOND,

Plaintiff,

No. 1:89CV321-D-D

v.

NEWMAN WHITNEY, Division of Newman Machine Company, Inc., and MEMPHIS MACHINERY AND SUPPLY CO.,

Defendants.

FINAL JUDGMENT AND ORDER GRANTING MOTIONS FOR JUDGMENT AS A MATTER OF LAW

This cause having come on for trial upon the Complaint of the plaintiff and the Answer of the defendant, and after a jury of eight persons having been empaneled to try the issues, and the court, after hearing the plaintiff's evidence, and receiving a motion for judgment as a matter of law pursuant to Rule 50(a), Fed. R. Civ.P., from both defendants, granted the motion for judgment as a matter of law as to defendant, Memphis Machinery and Supply Co., Inc., and initially overruled the motion of Newman Whitney, Division of Newman Machine Company, Inc., at the end of the plaintiff's case. After hearing the evidence of Newman Whitney and receiving a renewed motion for judgment as a matter of law from said defendant at the conclusion of all of

the proof, the court finds that said motion is well taken and that judgment as a matter of law should be granted in favor of the defendants, it is

ORDERED:

That the motions of Newman Whitney, Division of Newman Machine Company, Inc., and Memphis Machinery and Supply Co., Inc., for judgment as a matter of law be, and the same hereby are SUSTAINED, and the complaint in this cause is finally DISMISSED with prejudice.

This 8th day of December, 1992.

(g.h.d.)
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JIM EDMOND
LIBERTY MUTUAL INSURANCE

Plaintiff
Intervenor

vs.

Civil Action No. EC 89-321-D-D

NEWMAN WHITNEY, a Division of
Newman Machine Co., Et Al.

Defendants

ORDER OVERRULING MOTION FOR NEW TRIAL

The plaintiff has filed his motion for a new trial pursuant to Federal Rule of Civil Procedure 59 in the case sub judice. This court entered judgment as a matter of law in favor of the defendant Memphis Machinery Company at the conclusion of the presentation of the plaintiff's case. The court further entered judgment as a matter of law in favor of the defendant Newman Whitney at the conclusion of all of the evidence in the case. As discussed thoroughly in the trial record, this court is of the opinion that the danger inherent in the S370 planer was open and obvious to the plaintiff in this case. Pursuant to the authority cited in the trial record from both the Mississippi Supreme Court and the United States Court of Appeals for the Fifth Circuit, this court is of the opinion that the aforementioned judgments were properly granted.

Accordingly, the motion for a new trial in the case sub judice is not well taken the same is hereby denied.

ORDERED and ADJUDGED this 3 day of February, 1993.

(g.h.d.)
United States District Judge

S/NORMAN GILLESPIE,
CLERK
S/by Debi Houston
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7162

JIM EDMOND,

Plaintiff-Appellant,

versus

NEWMAN WHITNEY, Etc.,
ET AL.,

Defendant,

NEWMAN WHITNEY, Etc. and
MEMPHIS MACHINERY AND SUPPLY CO., INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

ON PETITION FOR REHEARING
(SEPTEMBER 7, 1994)
Before WIENER, EMILIO M. GARZA
and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied. 9/2/94

ENTERED FOR THE COURT:

(F.P.B.)
Fortunato P. Benavides
United States Circuit Judge
S/CHARLES R. FULBRUGE III
CLERK

some of these cases.

Let me have the Exhibit P-38, Mrs. Ellixson.

THE CLERK: Mr. Harmon has it. If you'll return it.

MR. HARMON: By all means.

THE COURT: All right. Gentlemen, we're doing a lot of recessing today.

But Joe, if you'll tell the jury to go on, they can get coffee, whatnot. Be back in the jury room at 20 after ten.

THE MARSHAL: Okay.

THE COURT: We'll be in recess until 20 past ten.

(Recess.)

(Jury absent.)

THE COURT: At the close of the plaintiff's case, the defendants' motion for judgment as a matter of law comes before the court for the court's consideration and ruling.

Of Course, the court must adhere to the pronouncements of the Fifth Circuit Court of Appeals in the seminal case of Boeing Company v. Shipman, 411 F.2d 365 (1969). "The court must view all of the evidence that has been introduced to this point in the case in a light and with all reasonable inferences most favorable to the plaintiff.

If, upon consideration of all of the evidence, facts, and inferences, the evidence points so strongly and overwhelmingly.

In favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, the motion for directed verdict should be granted. On the other hand if, there is evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of an impartial judgment might reach different conclusions, the motion for directed verdict should be denied."

In the case sub judice, of course, the cases of Melton v. Deere and the Batts case have been cited to the court, precedent; also the Edwards v. Sears, Roebuck cases concerning the theory of res ipsa loquitur.

The crux of the defendants' argument at this point is that the danger in this particular piece of machinery was open and obvious to the plaintiff and to any user of the machine and to any casual observer.

Also, the defendant Memphis Machine and Supply Company moves for judgment as a matter of law, distinguishing its position from the position of the Coca-Cola BottlingCompany of Vicksburg in the

Mississippi Supreme Court case of Coca-Cola Bottling Company v. Reeves.

The court will initially address the position of the Memphis Machine and Supply Company as a defendant in the case. Of course, counsel for Memphis cites the Shainberg, the old Shainberg case in Mississippi, holding that a retailer is not liable for what is shipped to it in a package. The Reeves case, on page 380 — the citation for the case is 486 So.2d, page 374 (Mississippi, 1986).

On Page 380, specifically, the Mississippi Supreme Court states: "Vicksburg Coke's own experience explains how it acquires and examines the Coke carton — Vicksburg Coke's own evidence explains how it acquires and examines the Coke cartons before using them, replacing filled Coke bottles in them. Vicksburg Coke, therefore, had far greater occasion to inspect the Coke carton than did the defendant in Shainberg, the shoes there in issue. Likewise, the consuming public and others lawfully on the premises would have no reason to rely for the safety of the carton upon anyone other than the original seller of the Coke, Vicksburg Coke. The point precisely is that the customer or bystander may reasonably be expected, under the facts of this case, to rely solely upon Vicksburg Coke. The contradiction in the Shainberg case proceeds upon the assumption that a reasonable consumer would rely upon the manufacturer of the shoes to the exclusion of the retail seller."

In the case sub judice, the Court notes from the exhibits that the machine very prominently has the name "Whitney" exhibited on two large plates that are displayed prominently on the machine. There is a small plate, I believe, that says "Memphis Machine and Supply Company, "very small plate on the side of the machine. But, in any event, there is no evidence in this record that Memphis Machine ever took possession of this machine, ever in any way inspected the machine, or that there was any reliance whatsoever by Airline Manufacturing Company on any representation made by Memphis Machinery Company. Exhibit P-38, to the contrary, indicates that Airline Machine Company picked up the piece of equipment from Baxter D. Whitney and Sons.

Accordingly, applying the Boeing v. Shipman test to the defendant Memphis Machinery and Supply Company, the court is of the opinion that the motion for judgment as a matter of law is well-taken. The same is hereby sustained.

Now, as to the remaining defendants in the case, Newman Whitney, a division of Newman Machine Company, et al., this court acknowledges that there is great validity to the argument made by Mr. Rood that the proof to this juncture is that any danger in this machine is open and obvious. However, the court, which decided the case — Melton v. Deere was my case. I'm the judge who granted the directed verdict. It was affirmed in the Fifth Circuit, 837 F.2d, page 1241 (Fifth Circuit, 1989).

And also the Batts v. Caterpillar Company was a case tried in this court. Taking the logic and the reasoning in the Batts case, which very — well. really, Judge Barksdale in essence approved essentially everything that was done in the trial court in the Batts case. I, in that case, felt that it was a question for the jury as to whether the condition of this machine was an open and obvious danger.

Like wise, in the Melton v. Deere case, since reflection on this case over a period of a couple of years, the dissenting opinion in this case written by Judge Reavley, in the opinion of the court, is a very logical discussion of the open and obvious defense in a products liability case in Mississippi.

Being guided by the Boeing v. Shipman test, taking all inferences in the light most favorable to the plaintiff, the court is of the opinion that the motion for judgment as a matter of law at the conclusion of the plaintiff's case is not well-taken insofar as the same pertains to the defendant Newman Whitney, a Division of Newman Machinery Company. The motion is overruled as to that defendant.

The court specifically notes that there is no claim in this case, no viable claim in this case,for punitive damages. If the pretrial order reflects any such claim, the same is hereby denied and overruled, and judgment as a matter of law as to any claim for punitive damages is granted.

All right. That's the ruling of the court. Now, what's the position of Newman Machine? Do you need a little time to see about your witnesses?

MR. NICHOLS: Your Honor, we — as we left yesterday, and in the course of previous discussion with the

Secondly, as far as compliance with the standards, the evaluation, design evaluation, we'd submit to the court that under the Hobart case that any evaluation by the

plaintiff's experts should be excluded as was Dr. Carley's testimony in that case, because their evaluation of the machine was done in the abstract, in a vacuum, and did not consider all the factors involved. The only credible expert testimony was that it complied with not only industry standards, but the voluntary ANSI standard that was applicable.

Thank you, Your Honor.

THE COURT: All right. Gentlemen, I'm going to take about a 15-minute break here to look over the cases you cited, and try to come back in with a ruling in 15 minutes.

(Recess)

(Jury absent.)

THE COURT: The Court has before it the defendants' motion for judgment as a matter of law at the conclusion of all the evidence in the case.

This court in addressing subject motion is bound by the pronouncements of the Fifth Circuit Court of Appeals in the seminal case of Boeing Company v. Shipman, 411 F.2d at page 365, (Fifth Circuit, 1969).

The customary and familiar standards in which the court must view the evidence and the motion at this juncture provide that: If upon consideration of all of the evidence, the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict, the motion should be granted. On the other hand, if there is evidence or such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, the motion should be denied.

The court must look at the evidence and all inferences in a light most favorable to the party opposed to the motion. By the same token, a mere scintilla of evidence is insufficient to present a question for the jury.

The case sub judice, of course, is a products liability case, where the plaintiff maintains an actionagainst the defendants alleging strict liability in tort, negligent design, and a negligent failure to warn. The court is obligated to follow the pronouncements of the Fifth Circuit Court of Appeals in similar cases.

There is no question that the most recent pronouncements are the case of Batts v. Caterpillar Company, 91-1511, decided within the last two weeks or ten days, dated November the 25th, 1992, and the case of Toney v. Kawasaki Company, 975 F.2d at page 162, (Fifth Circuit, 1992), which firmly establish the defense of open and obvious nature of any defect as a complete and an absolute bar in a products liability case. Now, these two cases were decided subsequent to this court's ruling in the case of Melton v. Deere, 887 F.2d at page 1241. I might add, when this court granted a directed verdict for the defendant in Melton v. Deere, that the cases that existed at that time and provided guidance for the court were the cases of Gray v. Manitowoc, 771 F.2d at page 866 (Fifth Circuit, 1985), and the District Court case of Hedgpeth v. the Fruehauf Company, 634 F.Supp. at page 93. That case was a District Court opinion written by Judge Tom S. Lee in 1986.

Now, subsequent to the Melton case, the Fifth Circuit addressed the open and obvious issue in Melton, and then these cases of Batts, which was also tried in this court, Batts v. Caterpillar, and Toney v. Kawasaki, have been decided. The Fifth Circuit in Footnote 2 on page 166 in the Toney v. Kawasaki case states, "It is clear, however, that whether a product presents an open and obvious danger barring recovery is in the first instance a question of law to be addressed by the Court," citing Melton v. Deere, and also citing Harrist v. Spencer-Harris Tool Company, 244 Miss. 84, 140 So. 2d, page 558 (Mississippi, 1962). "If as a matter of law the danger is open and obvious, it follows that the product is not unreasonably dangerous under Mississippi consumer expectation standards."

In the case sub judice, the court, in reviewing the evidence, is of the opinion that there is not one scintilla evidence that the danger in this case is latent, concealed, hidden. It's this court's recollection that all of the witnesses, both for the plaintiff and the defendant, acknowledged that these gears present an open and obvious danger when that door is open to this machine.

In the case sub judice, we also of the problem of causation proof on the part of the plaintiff. In that regard in this court's opinion, the factual situation is very similar to that addressed in the cases of Edwards v. Sears, Roebuck and Jordan v. Kelly-Springfield Company.

The court is of the opinion that the open and obvious nature of a defect or danger is a complete bar in a products liability case. In this case we are not so much concerned with the casual observer as we are with the customary user of the machine. The plaintiff was employed by the Airline Manufacturing factory for some years. He had worked near this machine for several years prior to the accident.

The court notes that there has been no proof as to how the precise injury occurred. In that regard, it's similar to these res ipsa loquitur cases. The court notes that the machine was in the factory some 27 years with out incident. There was no accident or incident involving this machine for that period of time. The court is of the opinion that there is no jury issue as to whether the danger relating to these gears and coming in contact with these gears was hidden or concealed. Accordingly, the court is of the opinion that the motion for judgment as a matter of law is well-taken. The same is hereby sustained.

All right. Mr. Marshal, see if the jury is here, please sir.

Let's keep our seats until the jury comes in, please. We will recess.

THE MARSHAL: Your Honor —

THE COURT: Yes, sir.

THE MARSHAL: — we have one juror that hasn't made it back yet.

THE COURT: Very well. We're a little early. We'll just keep our seats.

(Pause)

THE MARSHAL: They're all back.

THE COURT: All right. Let's have the jury please, sir.

(Jury in.)

THE COURT: All right. Ladies and gentlemen of the jury, when we recessed, the court told you that all of the proof in this case had been presented to you. Then after you were released on the recess, the defendants made a motion for judgment as a matter of law at the conclusion of all of the proof. I have sustained that motion. In effect, what I have ruled is that any defect or danger relating to this machine was open and obvious, it was open and obvious danger.

(Pause)

THE COURT: Must be some repair going on in this building.

In any event, the law in the circuit, ladies and gentlemen of the jury, is that if there's a danger that is not hidden, concealed, or latent, and it's an open and obvious danger, that's a bar to recovery in a products liability case. And I have in essence ruled that the — there is no proof to the contrary that the danger relating to these gears is open and obvious. therefore, I have sustained the defendant's motion for judgment as a matter of law.

Accordingly, there will be no decision for you to render relative to this case. You're fully and finally discharged. Your warrants for your jury service will be mailed to you. I thank you for your service. You may go.

(Jury out.)

THE COURT: Mr. Edmond, Mr. Jones, Mr. Harmon, you understand that this court is not the final authority. You have the right to appeal this case to the Fifth Circuit Court of Appeals.

MR. JONES: Yes , sir, we understand.